90-1380

Supreme Court, U.S.
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In The Supreme Court Of The United States

CITY OF AUSTIN, TEXAS,
Petitioner

v.

JOLEEWU, LTD.,
Respondent

Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Respectfully Submitted,

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"QUESTIONS PRESENTED"

1. Should the Fifth Circuit Court of Appeals have rendered its decision in this case based upon an issue (theory of law) which was never stated, raised or briefed at any level by Joleewu, Ltd ?

2. Should the Fifth Circuit Court of Appeals have followed the Federal Rules of Appellate Procedure which require, under Rule 28(a)(4), that the argument of Appellant contain the contentions of the Appellant with respect to the issues presented and the reasons therefor, with citation to the authorities, statutes and parts of the record relied on ?

"QUESTIONS PRESENTED"
(Continued)

3. Does the City of Austin have a right to be informed of the issues presented on appeal and to respond to the arguments raised ?

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CITY OF AUSTIN, TEXAS,

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JOLEEWU, LTD.,

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PETITION

FOR WRIT OF CERTIORARI

To the United States Court of Appeals for

the Fifth Circuit

Opinions Below

The original opinion in this cause was decided in the District Court for the Western District of Texas Austin Division. This opinion has not yet been reported. That opinion was appealed to the Court of Appeals for the Fifth Circuit, which opinion has not yet been reported either. Both opinions are included in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on November 1, 1990 and the Petition for Rehearing of Appellee, City of

Austin, was denied on November 19, 1990. The jurisdiction of this court is invoked under Rule 10 (a) of the Rules of the Supreme Court of the United States, which states that the Supreme Court will grant a writ of certiorari when a United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of its jurisdiction. The Fifth Circuit Court of Appeals has so departed from the accepted and usual course of judicial proceedings as to call for an excerise of the Supreme Court's jurisdiction. The Fifth Circuit Court of Appeals has so departed from the

accepted and usual course of judicial proceedings as to invoke the jurisdiction of the Supreme Court in that it failed to follow the Federal Rules of Appellate Procedure and relevant case law by rendering its decision based upon an issue (theory of law) that was never stated, raised or briefed at any level by Respondent, Joleewu, Ltd., (for purposes of this writ Joleewu, Ltd. will be referred to as "Respondent" and City of Austin will be referred to as "Petitioner") thus depriving Petitioner, the City of Austin, of its right to present its response to the argument of equitable estoppel raised on appeal. Since the Federal Rules of

Appellate procedure are rules of federal law, this is a federal question and Article III of the United States Constitution states that "the judicial power shall extend to all cases in law and in equity, arising from this Constitution, the laws of the United States . . . ." . See Filartiga v. Pena - Irala, 630 F.2d. 876, (2nd Cir. 1980), on remand 577 F. Supp. 860 (E.D.N.Y. 1984).

Statement

This suit was filed by Joleewu, Ltd. as an inverse condemnation suit, along with complaints for fraud in a real estate transaction, breach of contract, promissory estoppel and violations of the

5th and 14th Amendments to the U.S. Constitution. The decision of the United States District Court for the Western District of Texas, Austin Division, was to dismiss all complaints against the City of Austin. The inverse condemnation complaint was dismissed based on res judicata, and the complaints for fraud in a real estate transaction, breach of contract and promissory estoppel were dismissed based on governmental immunity. The complaints of violations of the 5th and 14th Amendments to the U. S. Constitution were part of the inverse condemnation complaint and were dismissed based on res judicata.

Joleewu, Ltd., appealed the decision to the United States Court of Appeals for the Fifth Circuit. In its decision, the Court of Appeals affirmed the decision of the District Court to dismiss Joleewu, Ltd.'s claims for fraud in a real estate transaction, breach of contract and promissory estoppel because they are barred by the doctrine of governmental immunity. However, the Court of Appeals reversed the decision of the District Court dismissing Joleewu, Ltd.'s claims for inverse condemnation and violations of the Fifth and Fourteenth Amendments to the U.S. Constitution because the Fifth Circuit asserted that

the City of Austin was "equitably estopped" to raise the defense of res judicata.

City of Austin's Petition for Rehearing was denied. The basis of such petition, as is the basis for this Petition for Writ of Certiorari, is that the defense of "equitable estoppel" was never raised at the District Court level or at the Appellate Court level by counsel for Joleewu, Ltd. Instead the Fifth Circuit in effect became counsel for Joleewu, Ltd., by raising the defense of equitable estoppel sua sponte and thereby denying the City of Austin due process and effective assistance of counsel because the City of Austin never

had the opportunity to brief or present at oral argument any response to the issue of equitable estoppel.

In addition, the Fifth Circuit Court of Appeals did not follow the Federal Rules of Appellate Procedure which, under Rule 28(a) thereof, require that the briefs of the appellant contain arguments with repect to the contentions of the appellant. Respondent, Joleewu, Ltd., has raised no argument with regard to equitable estoppel at any time, nor has it ever even mentioned the doctrine of equitable estoppel at any time.

Argument

The decision below should be reviewed because the actions of the Fifth Circuit judges rendering a decision based upon a different issue than those upon which appellant appealed have denied the City of Austin due process and effective assistance of counsel and have changed the premise of our adversarial system that appellate courts do not sit as self-directed boards of legal inquiry and research, but instead are arbiters of legal questions presented and argued by the parties before them. In addition, such actions by the Fifth Circuit judges have changed the character of our adversarial

system by removing the adversarial nature of it. In order to preserve the character of our adversarial system and to ensure that parties are not deprived of their due process rights nor of effective assistance of counsel, this Court should grant review.

The doctrine of equitable estoppel cannot be raised by the Fifth Circuit Court of Appeals in oral argument when such argument was not stated, briefed nor authorities given therefor by Respondent Joleewu, Ltd., at any time at the District Court level or at the Appellate level. Joleewu, Ltd. did not preserve such defense and therefore waived the defense

of equitable estoppel to res judicata.

Joleewu, Ltd. did not raise the defense of equitable estoppel in its Third Amended Original Complaint, nor did it allege any of the elements of such defense, even though it could have, as City of Austin had set forth its defense of res judicata to the inverse condemnation claim long before that, and Joleewu, Ltd. was quite detailed in all of its pleadings. In fact, Joleewu, Ltd. quite specifically labeled each one of its causes of action in its Third Amended Original Complaint, setting out six of them, and nowhere does it set forth the theory of equitable estoppel, even though City of Austin had already

plead res judicata. Further, in Joleewu Ltd.'s Brief to the Fifth Circuit it labeled its points of error, those being that res judicata did not apply because: (1) the subsequent condemnation suit is not res judicata to the prior inverse condemnation suit; (2) a subsequent suit cannot divest a court of jurisdiction of an issue properly before the Court; and (3) damages prior to the date of taking cannot be part of the condemnation award. None of these points of error nor any of the cases cited encompassed the defense of equitable estoppel.

Joleewu, Ltd. never raised the theory of equitable estoppel in its

Response to Defendant's Motion To Dismiss And For Summary Judgment. The most that Joleewu, Ltd. does in such Response is to mention that the damages sought in the present case were excluded from consideration in the condemnation case. In Appellant's Brief on appeal, Joleewu, Ltd. once again only stated that the damages sought in the present case were excluded from the condemnation case.

Joleewu, Ltd. did not state in any of the above-referenced documents that City of Austin made any false representations or adopted any inconsistent positions on which Joleewu

Ltd. relied to its detriment, nor did it allege anything in any way similar to that.

Instead, the issue of equitable estoppel was first raised, not by Joleewu, Ltd., but sua sponte by the Judges for the Fifth Circuit Court of Appeals. As a result, City of Austin did not address the issue of equitable estoppel in its reply brief, was not prepared to argue the issue at oral argument and did not even consider the defense of equitable estoppel until it was raised by the Fifth Circuit Court of Appeals at oral argument. The defense of estoppel cannot be raised by a district court sua sponte. Gillivan v.

Austin, 640 F. Supp. 1325 (D. Virgin Islands 1986). In that case, the Court stated that it could not raise that defense even though it wanted to. Furthermore, a party invoking the doctrine of estoppel must plead and prove each of the essential elements thereof, which include representation of a fact, rightful reliance thereon and injury or damage resulting from denial by the party making the representation. Steinberg v. Columbia Pictures Industries, Inc., 663 F. Supp. 706 (S.D.N.Y. 1987). Joleewu, Ltd. never mentioned the defense nor any one of its elements.

In addition, not only can the Court

not raise this doctrine sua sponte, but Joleewu, Ltd., in failing to raise the defense of equitable estoppel, waived the issue. Rule 28 (a) of the Federal Rules of Appellate Procedure provides:

> "The brief of the Appellant shall contain under appropriate headings and in the order here indicated:
>
> (4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the Appellant with respect to the issues presented, and the reason therefor, with citation to the authorities, statutes and parts of the record relied on."

According to Matter of Texas Mortgage Services Corp. v. Guadalupe

Savings & Loan Association, 761 F. 2d 1068 (5th Cir. 1985), Rule 28(a)(4) of the Federal Rules of Appellate Procedure has been construed as a mandate that the brief of the appellant contain a statement of the issues presented for review, and an argument portion which analyzes and supports those contentions. If issues are not raised and argued in the brief of the appellant, they are considered waived and will not be noticed or entertained by the Court of Appeals. McBride v. Merrell Dow and Pharmaceuticals, Inc. , 800 F. 2d 1208 (D.C. Cir. 1986). In Cannon v. Teamsters & Chauffeurs Union, 657 F. 2d 173 (7th Cir. 1981), "it was stated that it

would be patently unfair for the court to consider the new issue as properly before it since the other side had not been given advance warning that the issue would be raised." See also Environmental Defense Fund v. Costle, 657 F. 2d 275 (D.C. Cir. 1981) and United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976) (en banc) (per curiam), cert. denied, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed. 2d 250 (1977), the former of which states, "Considering an argument advanced for the first time in a reply brief, then, is not only unfair to an appellee" and the latter of which states: "but also entails the risk of an improvident or ill-advised opinion of the

legal issues tendered."

In fact, in Carducci v. Regan, 714 F. 2d 171 (D. C. Cir. 1983) that court pointed out carefully the dangers of Courts of Appeals attempting to remedy defects in the briefs of appellants when it stated: "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. Thus, Rule 28(a)(4) of the Federal Rules of Appellate Procedure requires that Joleewu Ltd.'s brief contain "the contentions of the appellant with respect to the issues

presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." Failure to enforce this requirement will ultimately deprive us in substantial measure of that assistance of counsel which the system assumes -- a deficiency that we can perhaps supply by other means, but not without altering the character of our institution."

There are numerous cases where the courts have adhered to the principle of not serving as counsel to one of the parties. In Morrison v. City of Baton Rouge, 761 F.2d 242 (5th Cir. 1985), the court stated that a ground urged by

plaintiffs for reversing a judgment was stated but not briefed. They, therefore, refused to consider that issue. The Fifth Circuit made the same type of ruling in Kemlon Products & Development Company v. United States, 646 F. 2d 223 (5th Cir.), cert. denied, 454 U. S. 863, 102 S. Ct. 320, 70 L. Ed. 162 (1981), and in Franceski v. Plaquemines Parish School Bd., 772 F. 2d 197 (5th Cir. 1985). In Picco v. Global Marine Drilling Co., 900 F. 2d 846 (5th Cir. 1990), the court held that an argument that was not presented to nor passed on by the district court, was not raised in the briefs to the court, and was not raised at any time prior to the

afternoon of oral argument, was not properly preserved for appeal and need not be reviewed by the court. The Seventh Circuit has held the same way, ruling in Reynolds v. East Dyer Development Co., 882 F.2d 1249 (7th Cir. 1989) that it would not consider argument which was not made in the opening brief and for which there was no citation of authority. It was also held improper to present new arguments in reply briefs.

The only case where the courts have agreed to consider an argument which was not briefed on appeal was Price v. Digital Equipment Corporation, 846 F. 2d 1026 (5th Cir. 1988). But there

were two reasons why the Court did so in that case and the reasoning was completely in line with the premise of not destroying our adversarial system of justice. The first reason was that in Price the appellant was pro se and the court desired to liberally construe the brief of appellant in order to assist him. The second reason was that because the issue had at least been stated by appellant, appellee had gone ahead and fully addressed the issue. Therefore, there was no prejudice to appellee and, as a result, there was no ineffective assistance of counsel on the part of appellee.

Raising the issue of equitable

estoppel at oral argument should not have been done by the Fifth Circuit judges in the present case because not only did Joleewu, Ltd. not brief the issue of equitable estoppel, including no argument or authority for it, Joleewu, Ltd. did not even plead or mention it. In addition, Joleewu, Ltd. was adequately represented by counsel who could have raised and briefed the issue. Finally, because the defense of equitable estoppel was never stated, raised or briefed by Joleewu, Ltd., City of Austin herein was totally unprepared to present its response to such defense and has never presented a response to such defense. City of Austin

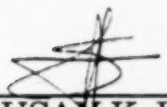
was, therefore, denied effective assistance of counsel while Joleewu, Ltd. had not only its counsel of record but the Fifth Circuit judges representing Joleewu, Ltd.

CONCLUSION

For the reasons that City of Austin was denied effective assistance of counsel, that the Fifth Circuit judges have changed the tenor of our whole adversarial legal system by effectively agreeing to represent Joleewu, Ltd. in its appeal to the Fifth Circuit, and that the Fifth Circuit failed to follow the Federal Rules of Appellate Procedure, it is respectfully submitted that this petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

IRIS J. JONES
CITY ATTORNEY



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ATTORNEYS FOR THE
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CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing instrument have been sent by certified mail, return receipt requested to Robert Lybrand, attorney for Joleewu, Ltd. at 8333 Douglas Avenue, Suite 1215-LB, Dallas, Texas 75225, (214) 369-1077, on the 28th day of February, 1991.

Susan K. Lefler